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No. 90-324

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In the Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC. D/B/A BROWN SHOE COMPANY, INC.,
PETITIONER

v.

KENNETH O. HICKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the racially motivated discharge of an employee is actionable under 42 U.S.C. 1981.

2. Whether the instructions and special interrogatories submitted to the jury allowed the jury to find a violation of 42 U.S.C. 1981 in the absence of sufficient proof of causation.

3. Whether the court of appeals erred in declining to reverse the trial court's finding of liability, since the jury found that petitioner would have discharged respondent even if race had not been a factor in the decision.

4. Whether the district court's award of $1 in nominal damages, following the jury's determination that respondent was not entitled to actual damages, violated petitioner's Seventh Amendment right to a jury trial.

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Respondent Kenneth Hicks, a white male, brought this action under 42 U.S.C. 1981 and the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* He claimed that his former employer, petitioner Brown Group, Inc., had unlawfully discharged him because of his race and age. See Pet. App. A1-A6. Petitioner denied those allegations and presented evidence that it had discharged respondent for legitimate, nondiscriminatory reasons. *Id.* at A3, A34-A35.

The case was tried before a jury in October 1988. The presiding magistrate gave the jury the following

Instruction No. 9 on the issue of liability (Pet. App. C1):

> Plaintiff is required to prove that his race or his age was either a determining factor or a discernible or motivating factor in the defendant's decision to remove plaintiff from his position.
>
> The term "determining factor" means a factor which made a difference in determining whether or not plaintiff was to be retained or terminated.
>
> The term "discernible or motivating factor" means a factor which was among two or more factors that played a part in, but did not necessarily control, the decision whether or not to retain or to terminate plaintiff.

Petitioner objected to this instruction on the ground that the use of the phrase "discernible or motivating factor" lessened the standard of proof required in a suit under Section 1981. Pet. App. A37.

The magistrate also submitted the following Special Interrogatories to the jury (Pet. App. C3-C4):

> 5. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a determining factor in his termination from employment by defendant?
>
> * * * * *
>
> 7. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., intentionally discriminated against plaintiff Kenneth Hicks on account of his race in that his race was a discernible or motivating factor in his termination from employment by defendant?
>
> * * * * *
>
> 10. Do you, the jury, unanimously find by a preponderance of the evidence that defendant Brown Group, Inc., would have terminated plaintiff Kenneth Hicks from employment, even had plaintiff's race or

age not been a discernible or motivating factor or a determining factor in the decision to terminate?

The jury answered "yes" to each of these Interrogatories. Pet. App. A44-A45, C3-C5. The jury also found that petitioner had not discriminated against respondent on the basis of age (Special Interrogatories Nos. 1 and 3), that respondent had not lost any back pay or benefits as a result of the racial discrimination (Special Interrogatory No. 6), and that respondent was entitled to $10,000 in punitive damages (Special Interrogatory No. 9). *Id.* at C3-C4. The jury was not asked to consider an award of nominal damages.

On October 26, 1988, the magistrate entered a judgment in favor of respondent for $1 in nominal damages and $10,000 in punitive damages. Pet. App. B1-B2.

2. a. Petitioner appealed the judgment, raising the following arguments: (1) a cause of action does not lie under 42 U.S.C. 1981 based on a discriminatory discharge from employment; (2) the district court erred in giving jury instructions and submitting special interrogatories that, by using the phrase "discernible or motivating factor," permitted the jury to find a violation of Section 1981 in the absence of sufficient proof that respondent's discharge was caused by intentional discrimination; (3) the district court's award of nominal damages violated petitioner's Seventh Amendment right to a jury trial; and (4) the evidence presented at trial was insufficient to support either the finding of liability or the award of punitive damages. Pet. App. A1-A2.

Respondent filed a cross-appeal, contending that the district court erred in denying his motion for reinstatement and related equitable relief. Respondent argued that he became entitled to such relief by virtue of the jury's finding (in response to Special Interrogatory No. 5) that his race was a determining factor in the discharge decision. He further argued that the jury should not have been allowed to answer Special Interrogatory No. 10 (which asked whether petitioner would have made

the same decision even if race had not been a factor), and that the jury's affirmative answer to that Interrogatory should be disregarded as surplusage, since the jury had already answered "yes" to Special Interrogatory No. 5. In the alternative, respondent requested a partial new trial to enable the jury to determine, in light of its finding that petitioner was motivated at least in part by race, whether race actually made a difference in the decision to discharge him. Pet. App. A44-A45.

b. On May 1, 1989, while the appeal and cross-appeal were pending, this Court rendered its decision in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989), which involved a claim of gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Court held that in a "mixed-motive" case, a plaintiff must initially bear the burden of proving that an impermissible criterion such as gender was a "motivating" or "substantial" factor in the employment decision; if the plaintiff carries that initial burden, the defendant can avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory motive. 109 S. Ct. at 1787-1788, 1790 (plurality opinion); *id.* at 1795 (White, J., concurring in the judgment); *id.* at 1796, 1798 (O'Connor, J., concurring in the judgment). After *Price Waterhouse* was decided, petitioner sought to raise a new issue in its answering brief on respondent's cross-appeal. Specifically, in answer to respondent's contention that Special Interrogatory No. 10 should be disregarded as superfluous, petitioner argued that the jury's finding in response to that interrogatory—that petitioner would have made the same decision to discharge respondent even if race had not been a factor—mandated entry of judgment for petitioner under *Price Waterhouse*. Pet. App. A45-A46.

c. On June 15, 1989, while the appeal and cross-appeal in the instant case were still pending, this Court ren-

dered its decision in *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, the Court held that 42 U.S.C. 1981, which guarantees all citizens "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens," "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations," but instead applies only to "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." 109 S. Ct. at 2372, 2374. The Court accordingly held that the racial harassment Patterson allegedly suffered during her employment was not actionable under Section 1981, because it was "postformation conduct by the employer relating to the terms and conditions of continuing employment," and did not involve "impairment of her ability to enforce her established contract rights." *Id.* at 2374.

3. a. On April 16, 1990, a divided panel of the Eighth Circuit affirmed the district court's judgment in all respects in this case. Pet. App. A1-A48. The court first concluded that *Patterson* left open the question whether 42 U.S.C. 1981 covers racially motivated discharges. Pet. App. A8-A14. It then held that discriminatory discharge claims continue to be cognizable under Section 1981. Pet. App. A14-A33. The court reasoned that, unlike racial harassment (at issue in *Patterson*) or discrimination in other terms or conditions of employment, a discriminatory discharge "totally deprives the victim of the fundamental benefit the right to make contracts was intended to secure—the contractual relationship itself." *Id.* at A17-A18. Thus, in the court's view, "[i]n order to give meaning to the right to make contracts free from discrimination, the right to be free from discriminatory discharge must be implied." *Id.* at A16. The court also believed that its interpretation was supported by the context in which Section 1981 was enacted, especially the importance attached in several studies during the Reconstruction period to establishing a "free contract labor system" to replace slavery. Pet. App. A21-A33.

Turning to the other issues raised by petitioner's appeal, the court of appeals held that the jury instructions and special interrogatories, "[c]onsidered as a whole, * * * adequately instructed the jury that [respondent] was required to prove intentional or purposeful discrimination to establish a Section 1981 violation." Pet. App. A38; see *id.* at A37-A38. Next, the court found sufficient evidence to support the jury's finding of liability and its award of punitive damages. *Id.* at A33-A37, A43-A44. Finally, it held that the district court's award of nominal damages did not violate the Seventh Amendment, because the jury's finding of liability automatically entitled respondent to nominal damages. *Id.* at A39-A43 (citing *Carey* v. *Piphus*, 435 U.S. 247 (1978)).

b. The court of appeals declined to consider the merits of respondent's cross-appeal, in which he argued that he was entitled to reinstatement and other equitable relief by virtue of the jury's finding under Special Interrogatory No. 5 that race was a determining factor, and that the district court therefore should have disregarded the jury's finding under Special Interrogatory No. 10 that petitioner would have made the same decision if race had not been a factor. The court of appeals concluded that because respondent had not objected at trial to the submission of Special Interrogatory No. 10 to the jury, that issue had not been preserved for appellate review. Pet. App. A46. Consequently, the court declined to consider petitioner's answer to the cross-appeal—namely, that under *Price Waterhouse*, the jury's answer to Special Interrogatory No. 10 mandated judgment in its favor. Instead, it left "for another day the determination of the precise effect (if any)" of *Price Waterhouse*'s allocation of the burden of proof under Title VII on Eighth Circuit precedents under Section 1981. Pet. App. A46.

c. Judge Fagg dissented on the ground that *Patterson* precluded an action under Section 1981 for a discriminatory discharge from employment. Pet. App. A47-A48.

4. Both parties petitioned for rehearing en banc. On June 4, 1990, both petitions were denied, with four judges dissenting. Pet. App. D1.

DISCUSSION

1. Petitioner first contends (Pet. 8-12) that the court of appeals' holding that racially motivated discharges are cognizable under 42 U.S.C. 1981 conflicts with this Court's decision in *Patterson* and with the post-*Patterson* decisions of other courts of appeals.

a. The court below concluded that *Patterson* did not foreclose a determination that a racially motivated discharge from employment is actionable under Section 1981. It noted that no claim of discriminatory discharge was before the Court in *Patterson* and that the Court did not specifically discuss the applicability of Section 1981 to such claims, make any mention of the Court's prior rulings on other issues in Section 1981 cases involving discriminatory discharges,[1] or refer to the large number of discharge cases under Section 1981 in the lower courts. Pet. App. A11-A14. Moreover, as the court below also observed, *id.* at A11-A12, two decisions of this Court since *Patterson* support the view that the discriminatory discharge issue remains open in this Court. In *Jett* v. *Dallas Independent School District*, 109 S. Ct. 2702 (1989), decided one week after *Patterson*, it was "assume[d] for purposes of these cases, without deciding, that petitioner's rights under [Section] 1981 have been violated by his removal" from his position. *Id.* at 2710. And in *Lytle* v. *Household Manufacturing, Inc.*, 110 S. Ct. 1331 (1990), another discharge case, the majority declined to apply the analysis in *Patterson* to the facts of

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[1] See Pet. App. A12 (citing *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987); *Saint Francis College* v. *Al Khazraji*, 481 U.S. 604 (1987); *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 276 (1976); and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975) (citing lower-court discharge cases)).

that case without the benefit of a full record or lower court determinations on the issue, *id.* at 1336 n.3, and Justice O'Connor wrote separately to note the Court's acknowledgement that "the question whether petitioner ha[d] stated a valid claim under [Section] 1981 remain[ed] open" on remand. 110 S. Ct. at 1338-1339.

Nonetheless, the seven other courts of appeals that have addressed the question since *Patterson* have all understood the Court's reasoning in that case to foreclose suits under Section 1981 based on an allegedly discriminatory discharge from employment, concluding that a discharge, like the harassment at issue in *Patterson*, is postformation conduct that falls outside Section 1981's prohibition against discrimination in the making or enforcement of contracts. See, *e.g.*, *Gonzalez* v. *Home Insurance Co.*, 909 F.2d 716, 722 (2d Cir. 1990);[2] *Williams* v. *First Union Nat'l Bank*, 920 F.2d 232, 233-234 (4th Cir. 1990); *Carter* v. *South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990);[3] *Prather* v. *Dayton Power & Light Co.*, 918 F.2d 1255, 1256-1258 (6th Cir. 1990); *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 108-109 (7th Cir. 1990);[4] *Courtney* v. *Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Thompkins* v. *DeKalb County Hospital Authority*, 916 F.2d 600, 601 (11th Cir. 1990);[5] cf. *Hill* v. *Goodyear Tire & Rubber, Inc.*, 918 F.2d 877 (10th Cir. 1990)

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[2] See also *Patterson* v. *Intercoast Mgt. of Hartford, Inc.*, 918 F.2d 12, 13-14 (2d Cir. 1990).

[3] See also *Spiller* v. *Ella Smithers Geriatric Center*, 919 F.2d 339, 344 (5th Cir. 1990); *Reeves* v. *MCI Telecommunications Corp.*, 909 F.2d 144 (5th Cir. 1990) (per curiam); *Walker* v. *South Central Bell Telephone Co.*, 904 F.2d 275, 276-277 (5th Cir. 1990); *Lavender* v. *V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-808 (5th Cir. 1990).

[4] See also *Sofferin* v. *American Airlines, Inc.*, No. 89-2662 (7th Cir. Jan. 29, 1991), slip op. 17.

[5] See also *Weaver* v. *Casa Gallardo, Inc.*, No. 89-3245 (11th Cir. Feb. 1, 1991), slip op. 1856-1857.

(holding retaliatory discharge claim is not actionable under 42 U.S.C. 1981, but declining to decide whether discriminatory discharge claim is actionable). The Eighth Circuit's decision in this case is clearly in conflict with these post-*Patterson* decisions of other courts of appeals.

b. Review by this Court ordinarily would be warranted to resolve a circuit conflict on an issue of such recurring importance. However, after the certiorari petition was filed in this case, and after the Court invited the Solicitor General to express the views of the United States, the Eighth Circuit granted rehearing en banc in another case to address the same issue. Because the Eighth Circuit—which stands alone—might eliminate the circuit conflict without intervention by this Court, we think that for the Court to grant plenary review in this case for that purpose would be premature.

Following the Eighth Circuit's denial of rehearing en banc (over four dissents) in this case, another panel of the same court expressed the view in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990), that the decision below is wrong (*id.* at 397 (citations omitted)):

> Absent the panel opinion in *Brown Group*, * * *, we would affirm the district court. In our opinion, the Supreme Court's decision in *Patterson* precludes section 1981 suits for discriminatory termination of employment. * * * Although we disagree with the *Brown Group* panel's interpretation of *Patterson*, "[a] decision of a panel of this court is the law of the circuit and we are compelled to follow it." *Dudley* v. *Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986). Only the court en banc can disregard this precedent.

On December 11, 1990, the Eighth Circuit granted rehearing en banc in *Taggart*. The court ordered supplemental briefing on the question whether Section 1981 applies to discriminatory discharges, and oral argument was held before the full court on February 1, 1991.

Thus, on the principal question presented, the petition for a writ of certiorari seeks review of a panel decision that is effectively being reconsidered by the en banc court of appeals—and may be overruled—in another case. There is no reason for this Court to grant plenary review of the issue at this time.

Moreover, the last Congress passed a bill that, *inter alia*, would have amended Section 1981 to make clear that it covers termination of employment and other contracts. S. 2104, 101st Cong., 2d Sess. § 12 (1990); see H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 8-9 (1990); 136 Cong. Rec. S15,407 (daily ed. Oct. 16, 1990); *id.* at H9994 (daily ed. Oct. 17, 1990). Although the President vetoed that bill, he did so for other reasons, and in fact the President at the same time urged adoption of an alternative proposal that likewise would have expanded the coverage of Section 1981 to cover the performance as well as the making of contracts. *Id.* at S16,418 (daily ed. Oct. 22, 1990).[6] A bill has been introduced in the current Congress that contains a similar provision to amend Section 1981. H.R. 1, 102d Cong., 1st Sess. § 12 (1991). Thus, it is possible that action by the current Congress will eliminate any continuing importance of the question whether Section 1981, as now in effect, covers discriminatory discharges.

For the foregoing reasons, we suggest that the Court grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand the case to the Eighth Circuit for further consideration in light of its decision to rehear *Taggart* en banc. If the Court does so, the Eighth Circuit could dispose of the instant case as appropriate in light of whatever decision that court renders in *Taggart*. If the en banc court holds in *Taggart* that a discriminatory discharge is not actionable

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[6] The Administration previously had submitted a proposed bill during the last Congress that would have made clear that Section 1981 covers discriminatory discharges. See S. 2166, 101st Cong., 2d Sess. § 2 (1990); 136 Cong. Rec. S1522 (daily ed. Feb. 22, 1990).

under Section 1981, petitioner would prevail in this case, the additional issues petitioner raises (see pages 11-17, *infra*) would become moot, and the circuit conflict would be eliminated. Conversely, if the en banc court reaches the same conclusion in *Taggart* as the panel did in this case, and if the panel below thereafter reinstates its affirmance of the district court's judgment in favor of respondent, petitioner could once again seek review in this Court. Either way, subsequent legislative developments might shed further light on the need for review by this Court.

2. Petitioner also contends (Pet. 12-15) that the court of appeals erred in sustaining a verdict based on a jury instruction that permitted the jury to find liability if race was a "discernible or motivating factor" in the decision to discharge respondent. Petitioner is correct that the quoted standard of liability is not equivalent to the standard established by this Court in *Mt. Healthy City School District Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Price Waterhouse*.[7] However, the posture of this case and the context in which the instruction was given render the issue largely academic in this case and of no continuing importance generally.

In *Mt. Healthy*, the Court held that, in a challenge under the First and Fourteenth Amendments to a decision not to rehire a public employee, the plaintiff initially bears the burden of proving that his constitutionally protected conduct was a "substantial" or "mo-

[7] Although this Court has not stated whether the framework of *Mt. Healthy* and *Price Waterhouse* should be applied in employment discrimination cases under Section 1981, we see no reason why it should not. Compare *Patterson*, 109 S. Ct. at 2377-2379 (applying Title VII framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), to claim of discriminatory denial of promotion under Section 1981). We note as well that the Eighth Circuit held (prior to *Price Waterhouse*) that the same "mixed-motive" analysis should apply to claims under Title VII and Section 1981. See *Estes* v. *Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 n.2 (8th Cir. 1988).

tivating" factor in the decision. 429 U.S. at 287. The burden then shifts to the defendant to prove that it would have made the same decision even in the absence of the protected conduct. *Ibid.* In *Price Waterhouse*, the Court applied a similar analysis to a "mixed motive" sex discrimination claim under Title VII, holding that if a plaintiff proves that gender (or another impermissible factor) played a "motivating" or "substantial" part in an adverse employment decision, the burden of proof shifts to the defendant, who can then avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory factor. 109 S. Ct. at 1787-1788, 1790, 1795 (plurality opinion); *id.* at 1795-1796 (White, J., concurring in the judgment); see also *id.* at 1798-1799, 1805 (O'Connor, J., concurring in the judgment).[8] The Court declined to adopt the alternative approach previously followed by several courts of appeals (including the Eighth Circuit in *Bibbs* v. *Block*, 778 F.2d 1318, 1320-1324 (1985) (en banc)) that liability is established if the plaintiff satisfies his or her initial burden, described above, and that the employer's burden goes to the question of relief. 109 S. Ct. at 1784 n.2, 1787-1788 n.10 (plurality opinion); *id.* at 1796 (O'Connor, J., concurring in the judgment).

The trial in this case took place before *Price Waterhouse* was decided, when *Bibbs* v. *Block* governed the determination of liability in employment discrimination cases in the Eighth Circuit. At that time, the Eighth

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[8] It is unclear to what extent one or both of the concurring opinions in *Price Waterhouse* differed from the plurality opinion with respect to the threshold showing the plaintiff must make to shift the burden to the employer. See 109 S. Ct. at 1790 n.13 (plurality opinion); *id.* at 1795 (White, J., concurring in the judgment); *id.* at 1805 (O'Connor, J., concurring in the judgment). Any such difference has no bearing on this case, because the jury's finding that respondent's race was "a determining factor" (see pages 2-3, *supra*, and page 13, *infra*) presumably would satisfy the threshold standard under any of the three opinions in *Price Waterhouse*.

Circuit's approach to mixed-motive cases was to require a plaintiff to prove that race was either a "determining factor" or a "discernible or motivating factor" in an employment decision. Proof that race was a "determining factor" would establish liability and normally entitle the plaintiff to reinstatement and back pay. Proof that race was a "discernible or motivating factor" would also establish liability, but if the trier of fact found that the defendant would have made the same decision in the absence of the illegitimate factor, the plaintiff would not be entitled to reinstatement and back pay. See *Estes* v. *Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988).

In this case, the jury found in response to Special Interrogatory No. 5 that respondent's race was a "determining factor" in the decision to discharge him, Pet. App. C3, which, under the district court's instructions, meant that respondent's race "made a difference" in that decision. *Id.* at C1. Under then-prevailing Eighth Circuit procedure, the jury should not have proceeded to answer Special Interrogatory No. 7. See *Estes*, 856 F.2d at 1102. But it did. Not surprisingly, the jury found in response to that Interrogatory that respondent had also satisfied the lesser burden of showing that his race was a "discernible or motivating factor" in the decision. That finding, however, was unnecessary to the jury's finding of liability, since it had already found that race was a determining factor. Thus, although the jury instructions *might* have permitted a finding of liability under an insufficient standard requiring nothing more than proof that race was one "motivating" or "discernible" factor, that did not happen in this case. Accordingly, any error in the reference in the instructions and special interrogatories to whether race was a "motivating" or "discernible" factor was of no moment even in this case. A fortiori, it does not present a question of broad importance warranting review by this Court.

This issue is especially unworthy of review because the district court's instructions and special interrogatories were given prior to *Price Waterhouse*, in the context of what petitioner characterizes (Pet. 13) as the "unique and confusing atmosphere" created by the special liability and burden-shifting rules adopted by the Eighth Circuit in *Bibbs* and *Estes*. See Pet. 12-13. As the Eighth Circuit has since acknowledged, *Price Waterhouse* will now require that court to modify its approach to mixed-motive cases under Title VII. See *Chaffin* v. *Rheem Mfg. Co.*, 904 F.2d 1269, 1274 (8th Cir. 1990). Presumably, *Price Waterhouse* will also require the Eighth Circuit to reevaluate its approach to mixed-motive cases under Section 1981 as well (see note 7, *supra*), although the panel below found it unnecessary to do so in this case. See Pet. App. A46. Because the effect of *Price Waterhouse* on Section 1981 cases was not decided below, and because this case was tried under different principles prior to *Price Waterhouse*, the instant case would not be an appropriate vehicle for consideration of that issue by this Court even if the issue otherwise warranted review.

3. Petitioner also contends (Pet. 15) that, under *Price Waterhouse*, a jury finding (rendered here in answer to Special Interrogatory No. 10) that the defendant would have made the same employment decision irrespective of considerations of race requires a verdict for defendant. Petitioner's argument is correct as a matter of law. But the court below did not rule to the contrary; it did not reach the question. Petitioner raised this argument in its answer to respondent's cross-appeal. Given the court of appeals' holding that respondent had not preserved the issue he sought to raise on his cross-appeal because he failed to object to the submission of Special Interrogatory No. 10 to the jury, the court had no occasion to reach petitioner's counter-argument based on Special Interrogatory No. 10. Pet. App. A46. There likewise is no occasion for this Court to do so.

Moreover, by answering "yes" to Special Interrogatory No. 5, the jury determined that race "made a difference" in petitioner's decision to discharge respondent. That finding would appear to satisfy the requirements under *Price Waterhouse* for finding an employer liable. Under applicable Eighth Circuit precedent, the jury should not then have been required to make a separate finding (here, in response to Special Interrogatory No. 10) on whether the employer would have made the same decision irrespective of considerations of race, just as the jury should not have answered Special Interrogatory No. 7 (discussed at page 13, *supra*). See *Estes*, 856 F.2d at 1102. That the jury nevertheless did answer that interrogatory, and gave a response that is seemingly inconsistent with its answer to Special Interrogatory No. 5, does not raise any issue of general importance. Rather, like petitioner's other objections to the jury instructions and interrogatories (discussed in point 2, *supra*), the wording of and jury responses to the interrogatories at issue here were tied directly to the Eighth Circuit's pre-*Price Waterhouse* precedents—and, indeed, to the district court's apparent failure to follow the procedure suggested by those precedents. Needless to say, such questions do not warrant review by this Court.

4. Finally, petitioner contends (Pet. 16-17) that the district court's award of $1 in nominal damages deprived petitioner of its Seventh Amendment right to a jury trial.[9] To begin with, the court of appeals' characteriza-

[9] Petitioner contends (Pet. 16) that the award of nominal damages is of practical significance in this case because, under *state* law, an award of at least nominal damages is a necessary predicate for an award of punitive damages. The court of appeals, however, concluded that the circumstances under which punitive damages are available under 42 U.S.C. 1981 turns on federal, not state law, and that under its precedents and those of other courts of appeals, respondent was entitled to nominal and punitive damages here. (The court further observed that it was not convinced that respondent would not be entitled to punitive damages even under Missouri

tion of the nominal damages award as "additur," Pet. App. A7, is somewhat misleading. The term "additur" usually refers to a trial court's denial of a motion for a new trial, conditioned on the defendant's consent to an increase in the amount of damages awarded to the plaintiff by the jury. See *Black's Law Dictionary* 38 (6th ed. 1990); 6A *Moore's Federal Practice* ¶ 59.08[8] (2d ed. 1989). This Court has held that that practice does indeed violate the Seventh Amendment, since a court may not "bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication." *Dimick* v. *Schiedt*, 293 U.S. 474, 486-487 (1935).

This case does not involve additur as traditionally defined, but rather the entry of an award of nominal damages following a jury's finding of liability in a civil rights action. The Eighth Circuit's approval of this procedure does not conflict with the decision of any other court of appeals. Lower courts have distinguished *Dimick* in a variety of situations in which there is no factual dispute as to the amount of damages to be awarded, see, *e.g.*, *Rocky Mountain Tool & Machine Co.* v. *Tecon Corp.*, 371 F.2d 589, 598 (10th Cir. 1966) (judge may increase damage award where amount of damages is established by law and jury has found liability); *Cummings* v. *Boston & M.R.R.*, 212 F.2d 133, 136-137 (1st Cir. 1954) (appeals court may increase award where trial court erroneously instructed jury on legal consequences of a payment); 6A *Moore's Federal Practice* ¶ 59.08[7], at 59-

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law.) Pet. App. A41-A43 & n.53. These subsidiary questions do not warrant review.

Moreover, the jury's verdict in this case establishes that the jury not only found petitioner liable for an intentional violation of Section 1981, but also believed that petitioner's conduct warranted an award of punitive damages in the amount of $10,000. There accordingly is no reason to believe that the jury would have declined to award $1 in nominal damages if it had been asked to consider that question as a necessary predicate for its award of punitive damages.

200 to 59-201; *id.* ¶ 59.08[8], at 59-217, and here there is no dispute as to the amount of nominal damages.

Lower courts have frequently awarded nominal damages in cases of racial discrimination. See, *e.g.*, *Edwards* v. *Jewish Hospital*, 855 F.2d 1345, 1350 (8th Cir. 1988) (holding that nominal damages are available for violation of Section 1981); *Howard* v. *International Molders & Allied Workers Union*, 779 F.2d 1546, 1533 (11th Cir.) (nominal damages presumed where liability found under Title VII and Section 1981), cert. denied, 476 U.S. 1174 (1986); *Irby* v. *Sullivan*, 737 F.2d 1418, 1433 n.30 (5th Cir. 1984) (plaintiff entitled to nominal damages in employment discrimination case under 42 U.S.C. 1983). Cf. *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (approving award of nominal damages in suit under 42 U.S.C. 1983 for procedural due process violation). The decision below is consistent with a recent decision from the Fifth Circuit, in which that court ordered an award of nominal damages based on a jury finding of liability in a suit under 42 U.S.C. 1983, observing that "[a]lthough neither the district court nor [the appeals] court has the power to add to the jury's verdict, when the amount of damages is not disputed and a party is entitled to damages under the verdict as a matter of law, [a court] may award that undisputed amount." *Taylor* v. *Green*, 868 F.2d 162, 165 (5th Cir.), cert. denied, 110 S. Ct. 127 (1989); cf. *Burt* v. *Abel*, 585 F.2d 613, 616 n.7 (4th Cir. 1978) (Seventh Amendment does not require jury trial where plaintiff's allegations entitle him to nominal damages only). Because the court of appeals' affirmance of the award of nominal damages on the basis of the jury's finding of liability in this case is consistent with the decisions of other courts of appeals, it does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings as appropriate in light of that court's order dated December 11, 1991, granting rehearing en banc in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990).

Respectfully submitted.

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